88-1913

No. ——

Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALBERT J. SMITH, JR.

and

JULIA C. SMITH,

Petitioners,

v.

CITY OF BRENHAM, TEXAS

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CRAIG C. CANTEY, JR.
Counsel of Record
CONNER & CANTEY
110 South Park Street
Brenham, Texas 77833
(409) 830-1279

May 26, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Are property owners Constitutionally entitled to compensation for extraordinary or protracted delay (now four and a half years) by public officials making or failing to make a bureaucratic decision which results in damage to the market value of their property?

PARTIES TO THE PROCEEDING

Petitioners are Albert J. Smith, Jr. and Julia C. Smith, of Brenham, Texas. Respondent is the City of Brenham, Texas. Intervenors below were A.P. Jozwiak, Pauline Jozwiak, R.H. Guire, Peggy Joyce Guire, Shirley M. Kmiec, Patricia Ann Jozwiak, Florian J. Zientek, Emily Z. Zientek, Mark Bilski, Linda Bilski, Larry J. Cegelski, Sandra K. Cegelski, Stanley J. Zientek, Victoria Bolcerek, Frank F. Mikeska, Elizabeth Mikeska, Julian Laskowski, Gilbert Laskowski and Frances Laskowski. These intervenors join petitioners in this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	8
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 2, 4
Agins v. *Tiburon*, 447 U.S. 255 (1985) 5
Baker v. *Carr*, 369 U.S. 186 (1962) 4
First English Evangelical Church v. *County of Los Angeles*, 482 U.S. 304 (1987) 5
Gardner v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967) 4
Laird v. *Tatum*, 408 U.S. 1 (1972) 4
Poe v. *Ullman*, 367 U.S. 497 (1961) 4

Other Authorities:

Fed. R. Civ. P. 12(b)(6) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ————

ALBERT J. SMITH, JR.

and

JULIA C. SMITH,

Petitioners,

v.

CITY OF BRENHAM, TEXAS

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Albert J. Smith, Jr., et uxor, Julia C. Smith hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 865 F.2d 662. The opinion of the district court (App. 5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1989. *See* App. 1a. Petitioners' request for rehearing was denied on March 15, 1989. App. 4a. This petition is accordingly filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V provides in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV provides, in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *

STATEMENT

This is an unprecedented case brought by the Smiths who own a small ranch on the outskirts of the City of Brenham. Late in 1984 the City authorized the purchase of a tract of land across from the Smith's home for the purpose of operating a city dump. The land was purchased by the City and the proposed dump was publicly announced nearly five years ago, but a permit has been neither granted nor denied to operate the dump, and there has never been any public hearing for such a permit scheduled. Nevertheless, there was a real and precipitous loss of market value to the Smith's property as a result of the announcement by the City that a dump would be installed in near proximity to their home. The complaint that was dismissed below clearly alleged this injury.

The City contends that petitioners, and all similarly-situated persons,[1] would suffer no judicially-cognizable harm until such time as the dump begins operation. In making this claim, the City sought dismissal of the action under Rule 12(b)(6), F.R.C.P., on ripeness and related justiciability grounds. The District Court dismissed the action on ripeness grounds, relying on the Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). The Court of Appeals affirmed, noting, among

[1] A number of adjoining property owners were allowed to intervene in the action below.

other things, that because the landfill operation is still in the inchoate and planning stage, "no taking in the constitutional sense has occurred." App. 2a.

REASONS FOR GRANTING THE PETITION

This case presents a question of increasing and substantial public importance—namely, whether property owners are constitutionally entitled to compensation for protracted delays in bureaucratic decision-making which results in damage to the market value of their property. In answering this question in the negative, the courts below ignored settled principles applicable to consideration of motions under Rule 12, F.R.C.P., as well as this Court's justiciability jurisprudence. But, more importantly, the lower courts failed to recognize the significant harm to persons that results from delay in governmental decision-making and the fact that this is a phenomenon of modern government that the courts can and must address.

More specifically, the Court of Appeals found the absence of a taking "in the constitutional sense" and dismissed petitioners' assertion of harm on the ground that "[n]one of the parade of horribles that arguably will accompany the operation of the landfill has come to pass; at this moment, the city has only announced its intention to operate a landfill on the site, and is currently in the process of obtaining approval from the Texas Department of Health." App. 2a. The petitioners, however, have asserted in their complaint that during the extended irresolution of the matter (which the Court of Appeals itself recognizes has persisted "now for four years"), they have been harmed: "The SMITHS' property *has been reduced* and their property taken by the act of the City in filing for the permit to operate the landfill described." App. 16a; emphasis added.

It is, of course, axiomatic that in reviewing a motion to dismiss on the pleadings the allegations of the com-

plaint must be accepted as true. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967). Accordingly, the action cannot be dismissed on the ground that no harm has yet occurred. That such harm has in fact already taken place has been well-pleaded, and all such allegations must be accepted as true for purposes of the City's motion to dismiss.[2]

Both courts below recognized that petitioners would be able to state a claim for relief through an inverse condemnation suit once the dump became operational. App. 2a; 6a. Petitioners, however, are currently suffering a "specific present objective harm" and on that basis they currently state a justiciable claim for relief. *Laird* v. *Tatum*, 408 U.S. 1, 14 (1972). Since petitioners undeniably have "a personal stake in the outcome of the controversy" created by the City's action (*Baker* v. *Carr*, 369 U.S. 186, 204 (1962)), and their injury is palpable and present, the requisite concreteness necessary to establish a case or controversy appropriate for judicial resolution has been shown. *Cf. Poe* v. *Ullman*, 367 U.S. 497 (1961). In short, the action is ripe for review and the courts below erred in failing to so rule. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

It must be stressed that more is at stake here simply than the failure of the courts below to apply settled prin-

---

[2] In any event, it can hardly be doubted that a public announcement that the City plans to locate a public dump directly across a narrow forty foot county road from petitioners' property would have an immediate and deleterious impact on the value of the property. This is especially so when the City has acknowledged in its application for the permit that "blowing refuse such as paper is a common nuisance associated with landfill operations," that "vultures and other birds of prey [are expected] to congregate and flock in the area," and that "putrescible waste" (waste capable of being decomposed by anaerobic organisms with sufficient rapidity as to cause nuisances from odors or gases and capable of providing food, or attracting birds, animals, insects, snakes, or rodents capable of mechanically or biologically transferring a pathogen from one organism to another) would be deposited at the dump. App. 14a.

ciples to the facts presented. Rather, the case is important because it squarely raises for the first time in this Court the issue of whether governmental inaction that palpably and predictably takes the property of persons by diminishing its value is redressable under the Constitution in the same way that an avowed taking is.

To be sure, fluctuations in market value pending the completion of public improvements frequently occur and it would impede legitimate government processes if the courts were to entertain reverse condemnation suits for every such fluctuation in property value so occasioned. But, as has been noted in this Court, "* * * mere fluctuations in value during the process of governmental decision making, *absent extraordinary delay*, are incidents of ownership." *Agins* v. *Tiburon*, 447 U.S. 255, 263 n.9 (1980); emphasis added. Even more directly, as Justice Stevens has recognized, "the Due Process clause * * * protects the property owner from * * * *unnecessarily protracted* governmental decision making." *First English Evangelical Church* v. *County of Los Angeles*, 482 U.S. 304, 339 (1987) (Stevens, J., dissenting); emphasis added.

The point is that the irresolution of this matter over an extended period of time—now more than four years—has significantly diminished in value petitioners' property, property which has had recent improvements made by petitioner that have cost approximately $1.2 million. App. 13a. Especially with respect to older persons, requiring that the governmental decision be completed before suit can be filed may be tantamount to denying any judicial recourse, since the mortality of the affected individual will at some point overtake the government's decision-making process.[3]

---

[3] In this general connection, we note that the Illinois legislature is currently considering a remedy for older plaintiffs seeking judicial relief by mandating a preferential hearing date for such persons. In this case, the petitioners cannot even file their lawsuit, let alone push it to trial on an expedited basis.

Property owners who are delayed for years in seeking redress are economically pillaged. A large portion of a person's life expectancy can be consumed by bureaucratic delay, without even the modest right to seek damages through inverse condemnation for that period. Where there are delays such as have occurred here, the affected property owners bear a terrible cost which should be borne by the public at large, as the plain language of the Fourteenth Amendment intends.

To argue that the petitioner's claim is theoretical or vacuous or an imagined injury is pettifoggery of the worst kind. Who would buy the Smith's property in order to lay around their swimming pool overlooking the dump? Or play tennis on their court while the stifling odors of putrefying organic waste wafts over the property? How many buyers are there for places with amenities such as separate guest quarters and employee quarters, stables and cabana and pool which fronts and overlooks a pit where city waste is buried? If the loss of the right to sell property is not property right, then what is? If the loss of market value is not a loss of property right, then what is? Finally, does the law seriously expect a couple which has spent over a million dollars to build their retirement home to live out their years overlooking a dump?

There is no doubt that where a governmental unit has announced the locus of a dump and followed up by purchasing the tract for cash and filing an application for a permit with the appropriate State authority, the adjacent property owner will suffer a severe injury. There is no doubt that this is the kind of a situation which does give rise to inverse condemnation claims. Never has a Texas home owner in similar proximity to a dump been denied compensation.

Where the property owner is virtually assured of some award and then—through protracted delay in a permitting process where he is not even an applicant and has

no standing even to call for a hearing—he is denied access to the procedure to get that award by no fault of his own, a gross injustice results. What causes the delay is of consequence. The delay itself is what matters —whatever the cause, whatever the bureaucratic excuse or motive.

The command of the Fourteenth Amendment is to accord due process to *all* deprivations of property. The government here has announced its plan and purchased the land to implement the plan. That it has delayed for more than four years the ultimate effectuation does not in any way diminish the havoc that has been wreaked upon petitioners. Their loss of property is real and immediate. Recourse to the courts to redress that injury must be made available to them at this juncture, lest through the unremediable and inelectuable progress of time they are left without any remedy at all.

Finally, it is no solace to contend that bureaucratic delay is a price we must pay for the benefits of modern government. The framework for our government was cast by the Founding Fathers in our Constitution and the Amendments that followed. This charter has guided our Nation to success and has anchored our society precisely because its application has been adjusted to the changes that have inevitably occurred in our governmental processes. The Fourteenth Amendment has been at the forefront of this process and the breadth of its protective reach has been consistently recognized by this Court. Its application to the issue raised here must also be recognized.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

CRAIG C. CANTEY, JR.
Counsel of Record
CONNER & CANTEY
110 South Park Street
Brenham, Texas 77833
(409) 830-1279

May 26, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-1526

Summary Calendar

ALBERT J. SMITH, JR., *et ux.*, JULIA C. SMITH,
Plaintiffs-Appellants,

v.

CITY OF BRENHAM, TEXAS,
Defendant-Appellee,

v.

A.P. JOZWIAK, *et ux.*, PAULINE JOZWIAK, *et al.*,
Intervenors-Appellants.

Feb. 15, 1989

Appeals from the United States District Court
for the Western District of Texas

Craig C. Cantey, Jr., Brenham, Tex., for A.J. Smith and J.C. Smith

Carl E. Clover, Jr., Connor, Odom & Clover, Sealy, Tex., for A.P. Jozwiak, et al.

James R. Raup, McGinnis, Lochridge & Kilgore, Austin, Tex., for City of Brenham, Tex.

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Appellants, property owners whose lands are located near the site of a proposed landfill to be operated by the City of Brenham, appeal the dismissal under rule 12(b)(6) of their action against the city alleging that they are the victims of an uncompensated taking, and seeking (1) damages for the diminished value of their land, (2) damages for their mental pain and suffering, and (3) an injunction against any further proceedings by the city designed to bring the landfill into operation. We affirm.

"Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered a taking in a constitutional sense.'" *Agins v. City of Tiburon*, 447 U.S. 255, 263 n. 9, 100 S.Ct. 2138, 2143 n. 9, 65 L.Ed.2d 106 (1980) (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939)). In *Agins*, the plaintiffs challenged a zoning ordinance that encompassed their very land. The Court, nevertheless, held that no taking had occurred. Here, the "governmental decisionmaking" involves only nearby property; hence, the constitutional argument is even weaker than in *Agins*. *See also Frazier v. Lowndes County, Mississippi, Bd. of Educ.*, 710 F.2d 1097, 1100-01 (5th Cir. 1983).

Thus, on the undisputed facts before us, no taking in the constitutional sense has occurred. None of the parade of horribles that arguably will accompany the operation of the landfill has come to pass; at this moment, the city has only announced its intention to operate a landfill on the site, and is currently in the process of obtaining approval from the Texas Department of Health. Although this process has been underway now for four years, we do not find the mere lapse of time in this case to constitute an "extraordinary delay." Nor does the complaint contain any allegations that the city has been acting in bad faith by purposefully retarding the process.

Under these circumstances, *Agins* compels the conclusion that no constitutional taking has occurred in this case. Appellants' reliance upon *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), is misplaced. Contrary to appellants' claims, *First English* did not set out a new test for determining when a taking has occurred; rather it assumed, for the purposes of the case, that a taking had occurred in holding that the Constitution requires compensation as a remedy for *temporary* regulatory takings. *See id.* 107 S.Ct. at 2384-85. *First English* thus in no way alters the holding of *Agins*, and, as *Agins* controls this case, dismissal of the appellants' takings claim was appropriate.

For similar reasons, appellants' claim under the due process clause of the fourteenth amendment is without merit. No deprivation of property in the constitutional sense has yet occurred; moreover, it may never occur, and certainly will not occur at least until the permit process, in which the appellants will have the right to a hearing before the Texas Department of Health, has run its course. Any due process claim is thus premature. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199-200, 105 S.Ct. 3108, 3123-3124, 87 L.Ed.2d 126 (1985).

Finally, we affirm the dismissal of the appellants' state law claims. Their assertion that a taking has occurred under the Texas Constitution, Art. I § 17, is without merit, for much the same reasons as under federal law. *See Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 820-22 (Tex.Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1526

ALBERT J. SMITH, JR., *et ux*,
and JULIA C. SMITH,
Plaintiffs-Appellants,

versus

CITY OF BRENHAM, TEXAS,
A Municipal Corporation in Washington County, Texas,
Defendant-Appellee,

versus

A. P. JOZWIAK, *et ux*,
PAULINE ZOZWIAK, *et al.*,
Intervenors-Appellants.

Appeals from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(March 15, 1989)

Before POLITZ, KING and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-881

ALBERT J. SMITH, JR., *et al.*

vs.

CITY OF BRENHAM,
a Municipal Corporation in Washington County, Texas

ORDER

[Filed June 22, 1988]

Before the Court are Defendant's January 14, 1988 Motion to Dismiss, Plaintiffs' February 22, 1988 response, and Defendant's March 2, 1988 reply, as well as Defendant's May 20, 1988 Amended Motion to Dismiss and June 7, 1988 supplemental brief. The Court has considered the Motion, as well as the rest of the filings, and is of the opinion that the Motion is meritorious and should be Granted.

Plaintiffs filed their complaint on December 23, 1987 requesting injunctive relief and attorney's fees pursuant to 42 U.S.C. § 1983. Plaintiff's claim that the Defendant's proposed operation of a landfill facility in Washington County, Texas, near Plaintiffs' residential property will result in the diminution of the value of Plaintiffs' property and a violation of Plaintiffs' civil rights under the United States Constitution. Plaintiffs also made a request for monetary damages under Section 1, Article 17 of the Texas Constitution; this cause falls

within the Court's pendent jurisdiction. On April 29, 1988, several other individuals owning land near the vicinity of the proposed landfill filed a motion to intervene in this lawsuit. The Court granted Intervenors' motion on May 16, 1988.

It is undisputed that Defendant has not yet begun operating the landfill in question. Plaintiffs state in their February 22, 1988 brief that "this projected landfill operation is on the cusp of being operational," while Intervenors state in their April 29, 1988 motion that "the movants' land will suffer additional adverse effects when the City of Brenham actually begins operation of the landfill." The principle issue raised by the Defendant's Motion to Dismiss is whether Plaintiffs' and Intervenors' claims for relief are ripe for adjudication when the Defendant has yet to receive a permit from the State of Texas to operate the landfill in controversy.

Specifically, Defendant argues that the Court should dismiss this case because Plaintiffs filed the lawsuit prematurely. Defendant claims that before a permit can be granted, the Texas Department of Health must provide an opportunity for a public hearing to the applicant (in this case, the Defendant) and to all persons affected, i.e., Plaintiffs and Intervenors. *See* Tex. Rev. Civ. Stat. Ann. art. 4477-7, § 4(e)(4) (Vernon Supp. 1988); 19 Tex. Admin. Code §§ 325.93 and 325.94. If a permit is granted, Plaintiffs and Intervenors may appeal to the Travis County District Court. Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1988). Defendant urges this Court to refuse to intervene in this controversy and interrupt the state administrative process which may afford the Plaintiffs their requested relief.

In addition, Defendant argues that Plaintiffs' suit for damages under a taking theory is also premature under the dictates of *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S. Ct. 3108 (1985).

Defendant relies principally upon the following language from the *Williamson County* decision:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. at 3121. *See also First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2384 n.6 (1987).

The doctrine of ripeness as enunciated by the Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), requires the Court to evaluate both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. This Court must consider four factors:

1. Whether the issues presented are purely legal;
2. Whether the challenged action constitutes a final agency action;
3. Whether there has been a direct and immediate impact on the Plaintiff so as to require judicial review; and
4. Whether immediate intervention by the Court will delay or impede enforcement by the agency.

Id. at 148-52.

The Court concludes that Plaintiff's claims are not ripe for adjudication under both *Williamson County* and *Abbott Laboratories*. Plaintiff has not sought compensation for the diminution in land values through available state procedures. Plaintiff is not challenging a final agency action.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss and Amended Motion to Dismiss are GRANTED.

SIGNED and ENTERED this 21st day of June, 1988.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-881

ALBERT J. SMITH, JR., *et al.*

vs.

CITY OF BRENHAM, *et al.*

ORDER

[Filed Sept. 14, 1988]

Before the Court are Intervenors' July 5, 1988 Motion for New Trial or Alternatively, Motion to Alter or Amend Judgment; Plaintiffs' July 6, 1988 Motion for Reconsideration of Order of Dismissal; as well as various responses and replies to these Motions. The Court has considered these Motions and is of the opinion that they are meritorious insofar as they seek an amendment of the Court's Order of Dismissal to reflect that the dismissal is without prejudice.

The Court finds Plaintiffs' and Intervenors' other arguments without merit. Plaintiffs contend that their claims for mental anguish and suffering are both ripe and cognizable under *McCullough v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980); and should have survived dismissal of the taking claim. In *McCullough*, the plaintiff was entitled to recover damages for a heart attack suffered as a consequence of the taking of property without due process of law. Given that Plaintiffs' claims for an unconstitutional taking are premature, so are Plaintiffs' claims for damages for mental anguish and suffering that are premised upon the unconstitutional taking.

Also before the Court are Intervenors' July 5, 1988 Motion for Leave to File Amended Complaint, and Plaintiffs' July 6, 1988 Motion for Reconsideration of Order of Dismissal insofar as it seeks leave to amend Plaintiffs' Complaint. The Court is of the opinion that these motions have been filed belatedly and should be Denied.

ACCORDINGLY, IT IS ORDERED that Intervenors' Motion for Leave to File Amended Complaint is DENIED.

IT IS FURTHER ORDERED that intervenors' Motion for New Trial is DENIED.

IT IS FURTHER ORDERED that Intervenor's Motion to Alter or Amend Judgment is GRANTED; and that an amended judgment is entered this day reflecting that the dismissal is without prejudice.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Reconsideration of Order of Dismissal is GRANTED IN PART; and that an amended judgment is entered this day reflecting that the dismissal is without prejudice. The Motion for Reconsideration is DENIED insofar as it seeks rescission of the Order of Dismissal.

SIGNED and ENTERED this 14th day of September, 1988.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-881

ALBERT J. SMITH, *et al.*

vs.

CITY OF BRENHAM, *et al.*

AMENDED JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss and Amended Motion to Dismiss are GRANTED; and that the above-numbered and styled cause of action is DISMISSED WITHOUT PREJUDICE.

SIGNED and ENTERED this 14th day of September, 1988.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. A 87 CA 881

ALBERT J. SMITH JR.,
et uxor, JULIA SMITH,
Complainants

vs.

CITY OF BRENHAM,
A MUNICIPAL CORPORATION IN
WASHINGTON COUNTY, TEXAS

[Filed Dec. 23, 1987]

PARTIES

The Complaining parties are Albert J. Smith Jr. and wife, Julia C. Smith (SMITHS), who reside in Harris County, Texas and own property in Washington County, Texas which is the subject of the dispute giving rise to this litigation. They reside at 5555 Del Monte, Residence 2106, Houston, Texas 77056.

The Defendant, City of Brenham (BRENHAM) is a Municipal Corporation formed under the Constitution and laws of the State of Texas and maintains its principal offices at City Hall in Brenham, Texas where service may be had by serving the Mayor of the City of Brenham, Dorothy Flisowski-Morgan, or the City Manager, Leonard Addickes at 210 N. Park, Brenham, Texas 77833.

JURISDICTION

This suit for an injunction and attorney's fees is brought pursuant to 28 U.S.C. 1331; 28 U.S.C. 1343; 42 U.S. 1983; the Fifth Amendment to the United States Constitution; and, the Fourteenth Amendment to the United States Constitution. Federal questions are presented and the amount in controversy exceeds $10,000.00.

An alternative pendant jurisdictional claim for damages is also made under Article 1, Section 17 of the Constitution of the State of Texas.

STATEMENT OF FACTS SUPPORTING CLAIMS

1. The Complainants (SMITHS) own about 176 acres, more or less, in Washington County, Texas. This tract has substantial improvements on it. The improvements include a main house designed for residential purposes as well as for business entertainment and leisure activities. There are also other buildings and accommodations for carrying on farm and ranch activities and there are separate living quarters for employees. The improvements are recent and cost about $1,200,000.00 to construct. The nature of the improvements as well as SMITHS' use of the premises is well known to the Defendant, City of Brenham.

2. The City of Brenham has acquired approximately 195 acres to own and operate a landfill facility directly across a narrow forty foot county gravel road from SMITHS' property. This site will be used by BRENHAM to dispose of municipal household garbage; infectious and pathological putrescible waste from the local veterinarians, research facilities, and hospitals; certain hazardous wastes, discarded tires, tree trimmings and related items; dead animals and slaughterhouse waste; water supply treatment plant sludges; stable water treatment sludges; asbestos waste; empty containers which have been used for pesticides, herbicides, rodenticides

and fungicides; and municipal hazardous waste for small quantity waste generators. "Putrescible waste" as used in this complaint means waste capable of being decomposed by anaerobic organisms with sufficient rapidity as to cause nuisances from odors or gases and capable of providing food, or attracting birds, animals or disease vectors. "Vectors" as used herein means insects, snakes, rodents or animals capable of mechanically or biologically transferring a pathogen from one organism to another.

3. The City of Brenham has acknowledged in its application for a landfill permit with the Texas Department of Health and filed with the State of Texas, that "Blowing refuse such as paper is a common nuisance associated with landfill operations, particularly during periods of high winds." Because of the proximity of SMITHS' property, it is inevitable that the operation will cause the littering of SMITHS' property. The City of Brenham likewise acknowledges in its application that roadside litter and litter of the landfill itself will be controlled only by policing the areas on Wednesdays which would allow litter to collect six days per week and be free to blow upon and litter SMITHS' property the balance of the time. The Texas Litter Abatement Act, Art. 4477-9, V.T.C.S. establishes 1000 feet as the distance landfills must be located from Interstate Highways and primary highways lest they generate litter. By this standard approximately 35 acres of the SMITHS' property is subject to the hazard of litter. The zone extends to the land immediately surrounding the SMITHS' improvements.

4. The operation of the dump will cause vultures and other birds to congregate and flock in the area. This phenomenon is such a nuisance that the City of Brenham points out in its application that there are no public access airports within seven miles and no private airstrips within one mile of the site since this is a fact which they must show in order to gain a permit due to other governmental regulations which relate to airports.

The same flocking birds will affect and interfere with SMITHS' lawful use of their property. The area affected by flocking birds is defined in FAA Agency Order 5200.5 "Guidance Concerning Sanitary Landfills on or Near Airports" is a ten mile radius around the landfill. All of the SMITH property is within less than one mile from the landfill and the entire frontage of the property is within 90 feet of the landfill burial pits.

5. Access to the site will be over Brenham County Road 89 which borders the full width of SMITHS' property, 1548 feet. All of Complainants' property will be equally affected along the entire road frontage and SMITHS have no other alternative for access to their property except by using said roads. The landfill site is on the side of a hill and the entire scope of the excavation and burial activities will be highly visible from the SMITH property. The view of unburied and buried garbage, the conduct of the routine landfill operation is so aesthetically disturbing to persons of ordinary sensitivity as to be so offensive as to constitute a nuisance which has resulted in substantial damage to SMITHS' property and will continue to do so.

6. The City of Brenham has stated in their operating plan to allow free access to the public and the truck traffic will include not only the trucks of the City of Brenham, but private commercial haulers and individual citizens at large—in short the public in general. The additional and extraordinary traffic of garbage trucks with their own attendant odors, noise, dust and vibration constitute a nuisance and will cause SMITHS' property to be less valuable.

7. The City of Brenham has declared that it will maintain a minimum of fifty feet set back line from the adjacent property line. Added to the right of way, this places the Complainants' property only 90 feet from where the City of Brenham has applied to dig pits and bury the materials described above. The operation will

be fenced with barb wire which is not calculated to be an effective control for blowing litter, nor will it control the disease vectors drawn by the operation from invading SMITHS' property. The health hazards imposed by this facility being adjacent to SMITHS' property constitute a nuisance and result in damage to the SMITHS' property.

8. Should the City of Brenham commence operations pursuant to the plan submitted to the Texas Department of Health, the operation will constitute a public nuisance and a taking without just compensation. As the material putrefies, the foul odors will drift over SMITHS' property. Litter will blow over their property. Flocking birds will interfere with SMITHS use and enjoyment of their property and improvements. The rumble of garbage trucks of the City and the general public will destroy the peace and tranquility of SMITHS' property with their vibrations, dust and noise. While SMITHS do not challenge the right of the sovereign to operate a dump, SMITHS do contend that their property will be used as a buffer for the property of others for this nuisance when it has not been condemned nor purchased; that the entire value of SMITHS' improvements will effectively have been destroyed and irreparable harm will continue to flow from the acts of the City of Brenham. The SMITHS' property has been reduced and their property taken by the act of the City in filing for the permit to operate the landfill described. Additional damage will result from the actual operation. Property of the SMITHS has been taken and damages have resulted to the SMITHS by the policy of the BRENHAM to own and operate a landfill across the road from the SMITHS. They are entitled to compensation as provided by the Fifth Amendment to the Constitution and the Fourteenth Amendment to the Constitution of the United States of America.

9. The official policy of the City of Brenham is to operate a landfill as stated herein. Such operation and application for such operation without either acquiring easements for the use of SMITHS' property or without condemning and acquiring SMITHS' property is a violation of the rights of SMITHS secured by Title 42, Section 1983 of the United States Code, (Civil Rights Act of 1871) and the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

10. Claim is further made that the SMITHS have been denied due process of law under the Fourteenth Amendment in that the Texas Department of Health Regulations required that public hearings be held prior to the acquisition of any site for a municipal landfill. No such hearings were held, instead the city of Brenham sought to keep the site selection process from public knowledge until the property was acquired. This failure to follow the Texas Department of Health Regulations denied Complainants the right to be heard and is further cause for injunctive relief and damages pursuant to 42 U.S.C. 1983.

11. Claim is further made by the SMITHS under Art. 1, Section 17 of the Constitution of the State of Texas, which mandates that property damaged by the operation of a public facility shall be compensated, and this Court has jurisdiction to adjudicate damages due to the SMITHS under the doctrine of pendant jurisdiction.

12. Pursuant to the provisions of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, the SMITHS are entitled to recover attorney's fees as the prevailing party. In that connection they would show that they did employ Craig C. Cantey Jr., a lawyer, to represent them and have agreed to pay his professional fees at the rate of $250.00 per hour and expenses in connection with the prosecution of this matter in their behalf.

RELIEF DEMANDED

A. SMITHS pray that upon a final hearing that the City of Brenham be enjoined from proceeding with the operation of the dump on the site which they acquired across the road from SMITHS' property because they have neither condemned SMITHS' property by the power of eminent domain nor have paid SMITHS such sum as this Court may determine to be adequate to compensate SMITHS for the damages due them. To allow BRENHAM to proceed with their announced policy would violate the SMITHS' Civil Rights and an injunction properly lies to protect the Civil Rights of the SMITHS under the provisions of the United States Constitution and Statute cited above.

B. SMITHS pray that upon a final hearing that this Court determine and award such damages as the SMITHS may show themselves entitled to because of the proposed operation of the sanitary landfill or dump in such close proximity to the SMITHS' property under Section 1, Article 17 of the Texas Constitution.

C. SMITHS pray that they have and recover attorney's fees and costs expended as provided by 42 U.S.C. 1988, Civil Rights Attorney's Fees Awards Act of 1976.

D. SMITHS pray for general and special relief, and their costs in this behalf expended.

Respectfully submitted,

/s/ Craig C. Cantey
CRAIG C. CANTEY, JR.
State Bar No. 03763000
Courthouse Square 116 S. Park
Brenham, Texas 77833-3645
(409) 836-3645
Attorney for Complainants

Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1913

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. SMITH, JR.

and

JULIA C. SMITH,

Petitioners,

v.

CITY OF BRENHAM, TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNSEL OF RECORD:

JAMES R. RAUP
McGINNIS, LOCHRIDGE & KILGORE
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION RESTATED

Whether a landowner's inverse condemnation suit complaining of an unconstitutional taking by a proposed landfill is premature when brought during the pendency of the state administrative process that will determine whether the state will grant a permit for the landfill, before the state has granted a permit to operate the landfill, before the landfill has been constructed or operated, and before the landowner has sought compensation through state inverse condemnation procedures.

NOTICE REQUIRED BY RULE 28.1

The City of Brenham is a municipal corporation; Rule 28.1 is not applicable in this case.

TABLE OF CONTENTS

Page

QUESTION RESTATED i
NOTICE REQUIRED BY RULE 28.1 ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
STATEMENT OF JURISDICTION 2
STATEMENT OF THE CASE 2
REASONS THE WRIT SHOULD BE DENIED 4
CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 4

Agins v. City of Tiburon, 447 U.S. 255 (1980).... 4, 5, 6

City of Abilene v. Burk Royalty Company, 470 S.W.2d 643 (Tex. 1971) 4

Coniston Corporation v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) 6

First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 107 S.Ct. 2378 (1987) 5, 6

Smith v. City of Brenham, 865 F.2d 662 (5th Cir. 1989) 3, 5

Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979) 6

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 4

OTHER

19 TEX. ADMIN. CODE §§ 325.61-.62 3

19 TEX. ADMIN. CODE §§ 325.93-.94 3

TEX. CONST. art. I, § 17 4

TEX. REV. CIV. STAT. ANN. art. 4477-7, § 4(e) 3

No. 88-1913

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. SMITH, JR.

and

JULIA C. SMITH,

Petitioners,

v.

CITY OF BRENHAM, TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Brenham respectfully requests that this Court deny the petition for writ of certiorari for the reasons stated below.

STATEMENT OF JURISDICTION

Respondent does not dispute the jurisdiction of this Court.

STATEMENT OF THE CASE

This is an inverse condemnation case, which Petitioners brought in the United States District Court for the Western District of Texas seeking damages and an injunction under federal and state law. Petitioners complained of a proposed landfill, which is to be operated on property owned by the City across a road from Petitioners' property if the Texas Department of Health grants the City of Brenham a permit to operate the landfill. It is undisputed that at all times relevant to this lawsuit the landfill of which Petitioners complain has been a mere future prospect and the subject of a contested administrative proceeding in the Texas Department of Health. In the administrative proceeding Petitioners are opposing the City's application for a permit and at the same time are prosecuting this litigation.

The complaint filed by Petitioners, which is attached as a part of the appendix to their petition, demonstrates that they did not complain about any alleged delay, extraordinary or otherwise, or bad faith in the district court. Petitioners sought an injunction to prohibit operation of the landfill, and they sought damages for the "taking" that they claim occurred when the City announced its intention to locate the landfill across the road from Petitioners' property and made application for

a permit from the state. The complaint demonstrates conclusively that Petitioners alleged that the proposed operation of the landfill would effect a taking, and they sought to enjoin the location and operation of the landfill.

The City moved to dismiss Petitioners' claims on the ground that the claims were not ripe for adjudication, and the district court agreed. By its orders of June 2, 1988, and September 14, 1988, the district court held that Petitioners' claims were premature and dismissed the claims without prejudice. There were two independent bases for the district court's decision: the lack of final agency action by the state agency charged by Texas law with determining whether and how the landfill would be operated and Petitioners' failure to seek compensation through Texas inverse condemnation procedures. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal. *Smith v. City of Brenham*, 865 F.2d 662 (5th Cir. 1989).

As of the date of this brief, Petitioners continue to use the property in Brenham, Texas, as a residence, and the City has not begun to construct and is not operating the landfill at issue. Petitioners continue to oppose the City's application for a permit from the Texas Department of Health, are conducting discovery in that administrative proceeding and have requested a public administrative hearing to contest the proposed landfill. Under Texas law Petitioners are entitled to a public hearing on the permit application, which can include land use issues affecting the City's property and their property. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 4(e); 19 TEX. ADMIN. CODE §§ 325.61-.62; 325.93-.94.

REASONS THE WRIT SHOULD BE DENIED

The decision below was based on well-settled principles of federal law and does not present a novel or an important federal question for this Court. Petitioners' "extraordinary delay" theory, which was raised for the first time in the Court of Appeals, is based upon an inapposite footnote in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and should not be a reason for granting the petition. The *Agins* footnote concerns whether preliminary activity by the government constitutes a "taking," and Petitioners misperceive the grounds for the dismissal of their claims. They did not allege extraordinary delay or bad faith in their complaint, and the district court did not dismiss the claims for failure to state a claim for a taking. The issue in this case is ripeness.

Petitioners' claims will not be ripe for adjudication until there is final agency action on the City's application for a permit to operate the landfill. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In addition, Petitioners' claims will not be ripe until the State of Texas denies compensation for any taking which Petitioners contend occurred. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Texas law provides an adequate remedy to compensate for a taking or damaging of property by the government if the claim is ripe for adjudication. *E.g.*, TEX. CONST. art. I, § 17; *City of Abilene v. Burk Royalty Company*, 470 S.W.2d 643 (Tex. 1971). Thus, for the two independent reasons relied upon below, dismissal of Petitioners' claims for lack of ripeness

is correct because the landfill at issue has not been permitted, has not been constructed, is not being operated and the state administrative proceeding to determine whether the landfill will ever be operated is ongoing.

Petitioners' belated "extraordinary delay" argument is disingenuous and is not a reason to grant the petition. First, this argument seeks to establish that a taking occurred from the pendency of the state administrative proceeding rather than that the claim is ripe for adjudication. Moreover, it is patently clear that on the facts of this case delay does not destroy all economically viable use of Petitioners' land but instead postpones the City's operation of the landfill and the parade of horribles which Petitioners predict will occur. *Smith v. City of Brenham*, 865 F.2d 662 (5th Cir. 1989). Petitioners are seeking a permanent delay of the landfill through the administrative process and the courts. This is not a case in which a landowner's proposed development or use of property is being prevented by governmental delay; the governmental decisionmaking involves only nearby property owned by the City, and any delay prevents the very use by the City that Petitioners seek to enjoin in this litigation.

The City's proposed landfill is a mere future prospect which may or may not occur, and this Court has made clear that preliminary activity by the government does not effect a taking. *E.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) and cases cited therein. Bad faith extraordinary delay may be relevant to determine the period for which compensation may be due from a taking, but the taking claim must first become ripe for adjudication. *See First English Evangelical Lutheran Church v. County of Los*

Angeles, ___ U.S. ___, 107 S.Ct. 2378, 2389 n.10 (1987). *Accord, Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988). Petitioners did not allege either bad faith or extraordinary delay in the district court and cannot dispute that they are litigating actively in the administrative proceeding. Finally, because Petitioners' property is outside the area to be used by the City for its proposed landfill, even Petitioners' taking theory is not well founded. *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784 (8th Cir. 1979). Neither *Agins* nor *First English* is a ripeness case, and neither supports granting the petition for writ of certiorari in this case.

CONCLUSION

The petition for writ of certiorari is based on an allegation that was not presented to the district court, and it ignores the ripeness issue completely. Petitioners argue that they have stated a claim for a taking but do not address the ripeness issue. Well-settled law of this Court, which was followed below, compels the conclusion that Petitioners' claims are not ripe for adjudication and that there has not been a taking. There has been no final action by the Texas Department of Health on the City's application for a permit to operate the landfill at issue, Petitioners can contest and are contesting the permit application in the state administrative proceeding, Petitioners will receive a public hearing in the administrative proceeding on all issues related to the landfill, including land use, and Petitioners have an available remedy through state inverse condemnation procedures if they

are dissatisfied with the result in the administrative proceeding. Moreover, the land proposed to be used as a landfill is merely in proximity to Petitioners' property, and they are using their property as a residence during the pendency of the administrative proceeding. Petitioners seek to have the federal courts interfere in an ongoing state administrative proceeding, in which they are active litigants, simply because they believe the process has taken too long. Neither the federal courts nor the state courts should do so.

There are no important questions of federal law presented by this case, and the petition for writ of certiorari should be denied.

Respectfully submitted,

McGinnis, Lochridge & Kilgore
James R. Raup
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-6982

By James R. Raup
State Bar No. 16584200

Attorneys for Respondent